BUSINESS LAW SECTION

CORPORATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA

July 11, 2006

The Honorable Richard Alarcon
Member of the Senate, District 20
State Capitol, Room 4035
Sacramento, CA 95814

SB 1207, as amended 6/28/06 – Oppose
Corporations Committee of
Business Law Section

Dear Senator Alarcon:

The Corporations Committee of the Business Law Section of the State Bar of California, composed of practitioners with extensive experience and expertise in corporate governance and securities law, regrets that it must continue to oppose your SB 1207 as that bill was amended on June 28, 2006, for the reasons expressed in the attached report.

If you have any questions concerning this position, please contact either the author of the report, Matthew R. Gemello (650.856.5541), or me (916.442.8018).

This position is only that of the CORPORATIONS COMMITTEE of the BUSINESS LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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Thank you.

Best Regards,

Larry Doyle
Chief Legislative Counsel

cc: Mark Farouk, Chief Consultant, Assembly Committee on Banking & Finance
Peter Renevitz, Republican Consultant, Assembly Committee on Banking and Finance
Sheldon Sloan, Chair, Board Committee on Stakeholder Relations
Matthew Gemello, Co-Chair, Business Law Section, Corporations Committee
Steven Stokdyk, Co-Chair, Business Law Section, Corporations Committee
Christopher Delfino, Vice-Chair, Legislation, Business Law Section, Corporations Committee
Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Rick Zanassi, Office of General Counsel, State Bar of California
Anthony Williams, Director of Governmental Affairs, State Bar of California
Saul Bercovitch, Office of Governmental Affairs, State Bar of California

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA

TO: Office of Governmental Affairs

DATE: July 10, 2006

RE: S.B. 1207 (Alarcon), as amended on June 28, 2006

Committee Position:

☒ Oppose

Date position recommended: July 7, 2006

Executive Committee vote: Unanimous

Corporations Committee vote: For: 18
Against: 1
Abstain: 1

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I. Statement of Position

The Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California welcomes this opportunity to comment upon Senate Bill No. 1207 ("SB 1207"). This is the fourth statement of opposition that the Committee has submitted on SB 1207.

(1) Description of S.B. 1207.

SB 1207 proposes to add a new Section 708.5 to the California Corporations Code (the "Corporations Code") to permit listed corporations to amend their articles of incorporation or bylaws to require the resignation of any director who does not receive approval of a majority of shares represented and voting in an uncontested director

election. Section 708.5 of the Corporations Code would permit a listed corporation to adopt a majority voting provision only in the form authorized by the statute.

(2) The Committee's Position.

The Committee appreciates the fact that SB 1207 has been amended to be an "opt-in" provision rather than a "default" majority vote provision. However, the Committee continues to oppose SB 1207 for a number of reasons, including the following:

(i) the current formulation of the bill undermines the longstanding protections afforded to shareholders by cumulative voting and the director removal provisions of the Corporations Code;

(ii) the bill permits corporations to adopt majority vote provisions, which create a significant risk of failed elections for those corporations; and

(iii) there are a number of technical problems with SB 1207 that would make it very difficult to follow in practice.

The Committee believes that any changes to the Corporations Code to permit corporations to adopt a majority vote standard in director elections should be carefully considered in light of these concerns. The Committee would welcome the opportunity to assist in crafting new legislation designed to permit California listed corporations to adopt a majority voting standard in a manner that would resolve the Committee's policy and technical concerns on this issue.

SB 1207 was initially proposed as a "default" rule, pursuant to which listed corporations would automatically be subject to a majority vote standard in uncontested director elections, unless they amended their articles of incorporation to "opt out" of that standard. Due to its history as "default" majority vote legislation, SB 1207 retains much of the inflexibility that led the Committee to oppose the bill from its inception. The Committee believes that, if California adopts legislation to permit corporations to adopt a majority vote standard, that legislation should be carefully drafted to minimize the adverse impact on the protections afforded to minority shareholders by cumulative voting and the director removal provisions of the Corporations Code, and to minimize the risk of failed elections for corporations. The Committee does not believe that SB 1207 is a good starting place for any such legislation. Any "opt-in" statute adopted should afford California corporations flexibility to design a majority vote provision that makes sense for that corporation and its shareholders. In practice, corporations that have adopted majority vote or director resignation policies have done so in a variety of ways. If California's provision proves too rigid (for example, with respect to the treatment of abstentions or withheld proxies, with respect to the definition of contested elections, or whether a corporation can refuse the resignation of or reappoint a director that does not receive the required vote), then we may find that California corporations that want to adopt a majority voting standard will not do so because of the defects with the California statute.

The Committee is aware that the issue of majority voting in director elections has garnered much attention in the last several years. A growing number of companies is adopting majority voting rules of some kind in their governance guidelines or bylaws, either independently or in response to shareholder requests.[1] The Committee believes that these changes are an indication that shareholders' voices are being heard and that the market is driving reform on this issue. The corporations that have addressed the majority vote issue in policies or bylaws have done so in a number of different ways, which evidences the Committee's belief that there is no "one-size-fits-all" solution to the majority vote question and that these corporations should have the flexibility to design policies that are

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1 At least 130 publicly traded corporations have adopted some form of majority voting policy or bylaw that requires a director to offer his or her resignation if he or she does not receive the number of votes required by the policy. Many of these policies or bylaws permit the board to determine whether or not to accept the resignation of such director.

appropriate to their particular needs and those of their shareholders. Many of these policies have been adopted relatively recently, so it remains to be seen if difficulties arise in their application over time. Finally, shareholder proposals regarding majority voting have failed to win shareholder approval at many corporations, including several recent proposals that failed to garner the requisite approval at corporations such as Honeywell and Paychex, indicating that shareholder support for such policies is not a foregone conclusion.

The Committee believes that there are a number of other means by which shareholders may express their displeasure with a corporation's board of directors. Under current law, shareholders unhappy with a board of directors may propose alternative candidates and run an election contest (in the case of public companies, through proxy statements subject to SEC review). Shareholders alternatively may engage in "withhold vote" campaigns, a number of which have been effective at focusing public attention on shareholder discontent with certain boards of directors, even though such campaigns do not result in the actual removal of directors. The "withhold vote" campaign against Michael Eisner at The Walt Disney Company is a well-publicized example of the publicity such a campaign can generate.

The American Bar Association's Committee on Corporate Laws (the "ABA Committee") established a task force to examine whether to revise the Model Business Corporation Act (the "Model Act") (which a majority of U.S. states follow in whole or in part, but not Delaware or California) with respect to voting for directors. In its study of majority voting in director elections, the ABA Committee released two draft reports and received numerous comment letters from a wide variety of sources. On June 20, 2006, the ABA Committee announced that it had adopted amendments to the Model Act to permit publicly traded corporations to adopt a form of majority vote provision in its bylaws. The Model Act provisions are a carefully crafted "opt-in" solution, designed to minimize the risk of failed elections for corporations choosing to adopt their standards, and do not, by their terms, apply to corporations that provide for cumulative voting. As described below, the latter point is not surprising as there is an inherent, and perhaps irreconcilable, conflict between majority voting and cumulative voting.

SB 1207 does not contain many of the provisions of the Model Act statute that protect against the risk of failed elections. Delaware (where more publicly traded corporations are incorporated than any other state) has recently enacted legislation that we understand is designed to assist corporations that choose to adopt majority vote policies or bylaws.[2] Delaware's new legislation permits more flexibility for a corporation to tailor the details of its voting policy to the particular needs of that corporation and its shareholders.

Undermining of Longstanding Policy Reflected in Corporations Code

The Corporations Code as currently in effect protects shareholders' influence over the composition of a California corporation's board of directors in a number of different ways, including through a requirement that California corporations permit shareholders to vote cumulatively in director elections (except in the case of listed corporations that opt out of such provisions with the approval of the board of directors and a majority of the outstanding shares of the corporation) and through the director removal statutes. Cumulative voting, embodied in Section 708 of the Corporations Code, is widely recognized as giving minority shareholders a greater voice in elections of directors than non-cumulative voting regimes. SB 1207 would permit listed corporations to eliminate

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2 Delaware Senate Bill No. 322, signed into law on June 27, 2006 and effective August 1, 2006, amends Section 141(b) of the Delaware General Corporation Law to provide: "A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable." That bill also provides that a majority vote bylaw adopted by vote of the shareholders may not be amended by the board of directors of a corporation. The Committee understands that the Delaware bill resulted from myriad efforts, including a detailed study of a committee of the Delaware Bar, to craft a flexible statute. The Committee respectfully submits that such a procedure would be useful in the context of California's own majority vote legislation and, by this letter, has formalized its offer to assist in this process.

this minority shareholder protection in uncontested elections. The current Corporations Code also protects minority shareholders by providing in Section 303 that directors may not be removed except by the affirmative vote of the majority of outstanding shares of the corporation. Further, in order to protect directors elected by minority shareholders using cumulative voting, pursuant to Section 303, a director elected by cumulative voting may not be removed when votes cast against removal would be sufficient to elect the director if voted cumulatively in an election. A majority vote standard would allow shareholders to remove a director with a smaller number of shares than is permitted by Section 303, and thereby weaken the protections afforded to minority shareholders. As a result of these significant policy concerns, the Committee believes that corporations should not be able to adopt majority voting standards lightly, but only with the support of at least the board of directors and a majority of their outstanding shares.

Risk of Failed Corporate Elections

A majority vote rule by its nature creates a risk of failed director elections, a risk that the Committee believes is substantially enhanced by SB 1207 in its current form. The failure of a director of a corporation to be elected under a majority vote standard can create a number of problems for a corporation and its shareholders. These problems may be particularly acute for a publicly-traded, or "listed" corporation, to which application of SB 1207 is limited. The risks of failed elections include:

- *Majority Voting Could Result in Director Vacancies or Failed Director Elections, Thereby Disrupting Board Operations.* If a candidate for a vacant board position fails to receive enough votes to be elected, or an incumbent director is required to resign after failing to receive enough votes, then that position may remain vacant. Vacant board positions may disrupt a board's performance, leaving the corporation in the position of having an insufficient number of members to carry out its work, or even no members. Having an insufficient number of directors would result in less effective oversight of the corporation and its management and may result in fewer individuals engaging in consideration and debate over challenging issues facing the corporation. Vacancies on a board of directors may also make corporations more vulnerable to opportunistic attacks by corporate raiders. It can be time consuming and difficult for boards to find qualified and willing candidates to fill vacant board positions.

- *Majority Voting May Result in Boards Lacking Individuals with Necessary Qualifications and Delisting of California Corporations.* The corporate governance listing standards of the securities markets set forth numerous independence and qualification requirements for directors. Corporations typically nominate directors after assessing these requirements. California listed corporations' ability to satisfy these requirements and maintain their securities exchange listings may be hindered if, as a result of majority voting, some nominees are not elected or are required to resign. Delisting of a corporation would significantly harm the liquidity of the public market for the corporation's stock, which would harm shareholders and could harm employees to the extent a portion of their compensation is premised on the existence of a liquid public market for the corporation's stock.

- *Majority Voting Could Deter Qualified Individuals From Agreeing to Stand as Director Nominees.* Corporations increasingly find it difficult to attract and retain talented, qualified directors. This is a serious issue confronting boards of directors, particularly as corporate governance reforms have increased boards' responsibilities and oversight functions. Majority voting may politicize director elections and encourage special interest campaigns against directors. As a result, majority voting may deter qualified candidates from seeking director positions.

- *Majority Voting Could Result in Contractual Breaches that Affect Companies and Employees.* If a CEO's or other officer's employment contract specifies that he or she will be a member of the board of directors, removal of that director could trigger severance obligations on the part of the corporation. In addition, failure to elect a requisite number of directors could trigger "change of control" provisions in debt agreements or other contracts, thereby causing adverse consequences under those contracts.

- *Majority Voting May Increase the Cost of Soliciting Shareholder Votes.* Majority voting will require corporations to be more active in soliciting votes from shareholders in order to garner the required majority

vote for director nominees. This could increase corporations' printing, mailing and, especially, soliciting costs.

- *Majority Voting May Lead to More Appointed Directors.* Under most majority vote provisions, if a director is not elected by the requisite vote and resigns, his or her seat would be declared vacant. The remaining directors would then have the authority to appoint a person to fill the vacancy (as is provided in Section 305 of the Corporations Code). If a significant number of vacancies occurred after any election, it would have the result that a significant portion of the board of directors of the corporation would not have stood for election by the shareholders at all.

The Committee believes that corporations are better able to address these risks if they are permitted to tailor any majority voting provisions to the particular circumstances and requirements of the corporation and its shareholders, and that any "opt-in" majority vote standard would have to provide corporations flexibility to make these important decisions, rather than having only an untested and inflexible majority vote standard to choose as an alternative to plurality voting.

Special Note – Inconsistent Voting Standards for Amendment of the Articles of Incorporation

SB 1207 as currently proposed includes a significant inconsistency, one which represents a problematic change to a long-standing California corporate governance policy. Under Section 902(a) of the Corporations Code, any amendment of the articles of incorporation requires approval of the board of directors and "approval of the outstanding shares" (as specified in Section 152 of the Corporations Code). However, SB 1207 permits a corporation to amend its articles of incorporation to permit majority voting if the "approval of the shareholders" (as specified in Section 153 of the Corporations Code) is obtained. In addition to the conspicuous omission of the board approval that is otherwise required for any other amendment to the articles of incorporation, SB 1207 would permit a corporation to adopt a majority vote provision with the lower standard of shareholder approval. The Committee believes that any changes to the articles of incorporation to effect majority voting should, at a minimum, require both approval of the board of directors and "approval of the outstanding shares" (as specified in Section 152 of the Corporations Code). While the Committee does believe that this inconsistency can be remedied by amending the current text of SB 1207, the fundamental nature of the inconsistency necessitates special attention in this letter.

Technical Difficulties with SB 1207

SB 1207 contains a number of provisions that are likely to present significant technical difficulties if enacted as drafted, including the following:

1. The bill as amended would still permit corporations to undermine existing cumulative voting and director removal statutes. As we have previously noted, majority voting creates risks of failed elections, which are no less problematic if the corporation voluntarily adopts the provision (though at least a voluntarily adopted policy hopefully could be crafted to minimize those issues). As currently proposed, SB 1207 would allow a corporation to adopt a majority vote provision in its articles of incorporation or bylaws with the approval of fewer shareholders than would be required to elect directors.

2. In order to minimize the risk of failed elections, the board of directors should not be limited as to whom it appoints to fill any vacancy resulting from a nominee's failure to be elected pursuant to a majority vote standard. Many corporations that have adopted majority vote standards have reserved the right to appoint the nominee who was not elected to fill the vacancy, if the board of directors determines in good faith that the appointment is in the best interests of the corporation. The Model Act majority voting provisions do not restrict the board of directors to nominate any person it selects to fill a vacancy left by a nominee that is not elected by the requisite vote. We understand that this flexibility provided by the Model Act is extremely important to listed companies, in part due to concerns relating to compliance with the national stock exchanges' listing standards but, in addition, with respect to more fundamental concerns regarding board composition and membership. While proponents of SB 1207 may highlight the cure periods set forth in those listing standards as the appropriate vehicle for accommodating these concerns, the Committee does not believe that these cure periods adequately address all situations in which a board of directors may find it in the best interests of the corporation and its shareholders to

appoint a director who has not received the required vote pending a negotiated outcome. Some of the situations not addressed by these cure periods are identified in previous comments of the Committee.

3. SB 1207 provides in Section 708.5(c) that, for a corporation that has adopted the provisions of Section 708.5, "shares voted withheld shall be considered shares voted against a director and shall be considered represented and voting. However, shares that do not indicate a vote shall not be considered represented and voting." The intent of these two sentences is ambiguous and confusing, and language to this effect is not used in any other provision of the Corporations Code that are subject to approval of the shareholders pursuant to Section 153 of the Corporations Code. A proxy card is not a ballot; it is a grant of authority to another person to vote shares in the manner set forth on the proxy. It is a contradiction in terms to say that a share is "voted withheld." A shareholder could also withhold authority to vote his, her or its shares by not executing a proxy card at all, but SB 1207 appears to treat that situation differently than withholding authority in a signed proxy card. A proxy card marked withhold is not the same as a vote against a director, and should not be treated differently than other shares that are not voted in an election. Corporations adopting a majority voting standard will have the ability in their proxy cards to provide shareholders with the means to vote for or against a director, in addition to withholding authority to vote. Since it will be possible to vote "against" a director, treating proxies marked withhold as a vote against a director is even less appropriate.

In addition to the difficulty interpreting the language as proposed, requiring corporations that wish to adopt majority voting to use the provisions of SB 1207 could significantly increase the risk of failed elections for California corporations as a result of potential changes in the broker voting rules of the New York Stock Exchange (the "NYSE"). The NYSE is considering eliminating the discretionary authority that currently allows brokers to vote for directors without specific instructions from their clients. We believe that clients routinely fail to give their brokers instructions, and that such a change in the broker voting rules may therefore result in a large increase in the number of proxy cards returned to a corporation by brokers with authority to vote withheld. Under SB 1207, for a corporation that had adopted the provisions of Section 708.5, these proxy cards would then be treated as votes against a director, even though no instructions of any kind may have been given by the beneficial owners of the shares in question. An analogy to the political process would be (i) to require that, to be elected, a candidate must obtain a majority of votes cast in an election and (ii) to count voters who are registered to vote but do not show up at the polls on election day as votes cast against a candidate.

4. Most commentators agree that a corporation that has cumulative voting rights should not be able to adopt a majority voting standard, but SB 1207 permits that to occur. A cumulative voting standard and a majority vote standard are fundamentally at odds with one another, as cumulative voting ensures that a minority shareholder with enough shares will have proportional representation on the board of directors, whether the election is contested or uncontested. The apparent ability of a corporation both to adopt majority voting and maintain cumulative voting under proposed Section 708.5(d) is, at best, illusory. If a corporation adopted SB 1207 in its current form, it would eliminate this right for minority shareholders in uncontested elections, requiring minority shareholders to force every election to be contested in order to ensure its proportional representation on the board of directors.

5. SB 1207's definition of an uncontested election refers only to the time of the election. This definition would make it difficult for shareholders to plan how to vote and for corporations to solicit proxies, given that elections may be contested at the time proxies are solicited but settled by the time of the vote. The inability to plan in this situation will be particularly difficult for shareholders of corporations with cumulative voting, since shareholders will not know until the time of the meeting whether they will need to plan how to cumulate votes. Moreover, whatever protective elements a default majority vote rule might offer in the context of an uncontested election could be defeated by a floor nomination of a nominal candidate that virtually no shareholder would support, a move almost certain to result in confusion and less effective governance. In addition, many listed corporations have bylaws requiring advance notice of any nominees for director. The time imposed by an "advance notice bylaw" could be a reasonable time to determine whether an election is contested or uncontested. Ultimately, due to the difficulty in pinpointing any time at which an election to be contested or uncontested, the board of directors should be permitted to retain flexibility to determine whether an election is contested or uncontested for purposes of determining whether an adopted majority vote standard should be applied. The Model Act provides that whether an election is contested would be determined by reference to a corporation's advance notice bylaws, or in the absence of such a bylaw, by the board of directors; SB 1207 in its current form simply does not afford that

flexibility.

6. In the proposed version of SB 1207, the bill fails to clarify that Sections 708.5(d) and (e) apply only when a Section 708.5(b) amendment to the articles has been adopted, which could result in significant confusion in the application of those provisions.

Impact on California Corporations and Perception of California's Attitude Toward Businesses

Today, a relatively small number of listed companies are California corporations. As proposed, SB 1207 may deter listed corporations from adopting the majority vote provisions it would permit, due to the inflexibility of the provisions of SB 1207, and could encourage California corporations to reincorporate in a state that has more flexibility on this issue.

II. Germaneness

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on SB 1207 and that the positions advocated herein are in the best interests of California corporations and their shareholders.

III. Caveat

This statement is that only of the Corporations Committee of the Business Law Section of the State Bar of California. The positions expressed herein have not been adopted by the Business Law Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Business Law Section.

Membership in the Business Law Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

BILL NUMBER: SB 1207 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY JUNE 28, 2006
AMENDED IN SENATE MAY 16, 2006
AMENDED IN SENATE MAY 3, 2006
AMENDED IN SENATE APRIL 18, 2006
AMENDED IN SENATE FEBRUARY 28, 2006

INTRODUCED BY Senator Alarcon

JANUARY 26, 2006

An act to amend Section 708 of, and to add Section 708.5 to, the Corporations Code, relating to corporations.

LEGISLATIVE COUNSEL'S DIGEST

SB 1207, as amended, Alarcon Corporations: uncontested election of a listed corporation.

Existing law provides that, in any election of the members of the board of directors of a corporation, the candidates receiving the highest number of affirmative votes of the shares entitled to be voted for them up to the number of directors to be elected by those shares are elected.

This bill would ~~specify that, in any~~ *authorize a listed corporation to amend its articles of incorporation or bylaws to provide that in an* uncontested election of a listed corporation, as defined, approval by a majority of the shares represented and voting would be required to elect each director ~~, except in certain circumstances~~ .

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 708 of the Corporations Code is amended to read:

708. (a) Except as provided in Sections 301.5 and 708.5, every shareholder complying with subdivision (b) and entitled to vote at any election of directors may cumulate such shareholder's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which the shareholder's shares are normally entitled, or distribute the shareholder's votes on the same principle among as many candidates as the shareholder thinks fit.

(b) No shareholder shall be entitled to cumulate votes (i.e., cast for any candidate a number of votes greater than the number of votes that the shareholder normally is entitled to cast) unless the candidate or candidates' names have been placed in nomination prior to the voting and the shareholder has given notice at the meeting prior to the voting of the shareholder's intention to cumulate the shareholder's votes. If any one shareholder has given that notice, all shareholders may cumulate their votes for candidates in nomination.

(c) Except as provided in Section 708.5, in any election of

directors, the candidates receiving the highest number of affirmative votes of the shares entitled to be voted for them up to the number of directors to be elected by those shares are elected; votes against the director and votes withheld shall have no legal effect.

(d) Subdivision (a) applies to the shareholders of any mutual water company organized or existing for the purpose of delivering water to its shareholders at cost on lands located within the boundaries of one or more reclamation districts now or hereafter legally existing in this state and created by or formed under the provisions of any statute of this state, but does not otherwise apply to the shareholders of mutual water companies unless their articles or bylaws so provide.

(e) Elections for directors need not be by ballot unless a shareholder demands election by ballot at the meeting and before the voting begins or unless the bylaws so require.

SEC. 2. Section 708.5 is added to the Corporations Code, to read:

708.5. (a) For purposes of this section, "uncontested election of a listed corporation" means an election by the shareholders of a domestic corporation that qualifies as a listed corporation under subdivision (d) of Section 301.5 in which, at the time of the election, the number of nominees for the board of directors does not exceed the number of directors to be elected by the shareholders at that election.

(b) ~~In any~~ *(1) Notwithstanding paragraph (5) of subdivision (a) of Section 204, a listed corporation described in subdivision (a) may amend its articles of incorporation or bylaws to provide that in an* uncontested election of a listed corporation, approval of the shareholders, as specified in Section 153, shall be required to elect a director. For

(2) Notwithstanding Sections 211 and 902, an amendment of the articles of incorporation or bylaws, described in paragraph (1), may be adopted by approval of the shareholders, as specified in Section 153.

(c) In an election of directors following an amendment of the articles of incorporation or bylaws described in subdivision (b), for purposes of Section 153, shares voted withheld shall be considered shares voted against a director and shall be considered represented and voting. However, shares that do not indicate a vote shall not be considered represented and voting.

~~(c) A listed corporation described in subdivision (a) may amend its articles of incorporation or bylaws to provide that uncontested elections of a listed corporation shall instead be conducted in the manner specified in subdivision (c) of Section 708, however, this amendment shall require approval of the outstanding shares, as specified in Section 152.~~

(d) Shareholders may not cumulate their votes in accordance with Section 708 in an uncontested election of a listed corporation unless the corporation amends its articles of incorporation or bylaws to provide for cumulative voting ~~pursuant to subdivision (c).~~

(e) Notwithstanding subdivision (b) of Section 301, if, in an uncontested election of a listed corporation described in subdivision (b), an incumbent director fails to be approved by the shareholders, then the incumbent director shall resign within 90 days of the date of the election and the board shall declare vacant the office of that director. A director's resignation pursuant to this subdivision shall not constitute removal for any purpose. A vacancy on the board

resulting from a director's resignation under this subdivision shall be filled in accordance with the procedures set forth in Section 305. A candidate in an uncontested election of a listed corporation who fails to be approved by the shareholders shall not be appointed to fill any vacancy on the board.